IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*, ***Plaintiffs,*** ***v.*** **TYSON FOODS, INC., *et al.*,** ***Defendants.***	**Case No. 4:05-cv-00329-GKF-SAJ**

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' OBJECTION TO MAGISTRATE JUDGE JOYNER'S AUGUST 8, 2008 OPINION AND ORDER

Defendants respectfully submit this Response in Opposition to Plaintiffs' Objection to Magistrate Judge Joyner's August 8, 2008 Opinion and Order (Dkt #1757) ("Plaintiffs' Objection"). The Magistrate Judge's findings that the requests for extension were "reasonable and necessary" are firmly supported by the record and not clearly erroneous. Accordingly, the Court should deny Plaintiffs' Objection and affirm Magistrate Judge Joyner's Order granting the extensions of time for Defendants to file their expert reports.

ARGUMENT

Plaintiffs' Objection to Judge Joyner's ruling is merely the latest in a pattern. Plaintiffs reflexively appeal each of Judge Joyner's rulings with which they disagree, no matter how sound the rulings or whether the Plaintiffs suffer any tangible prejudice. *See* Pls.' Obj. to Mag. Judge Joyner's Aug. 8, 2008 Opinion and Order (Aug. 21, 2008, Dkt #1757) ("Pls.' Obj."); Pls.' Obj. to Mag. Judge Joyner's May 20, 2008 Opinion and Order (June 4, 2008, Dkt #1716); Pls.' Obj. to Mag. Judge Joyner's Order Granting Mot. to Compel and Order Denying Reconsideration (Mar. 27, 2008, Dkt #1659); Pls.' Obj. to Mag. Judge Joyner's Feb. 1, 2008 Opinion and Order

(Feb. 4, 2008, Dkt #1504); Pls.' Obj. to Amended Scheduling Order (Jan. 25, 2008, Dkt #1470). This practice is inappropriate, as it further strains the resources of the defendants and the Court in responding to Plaintiffs' claims.

The rules make clear that objections should not be filed as a matter of course. In ruling on an objection under Federal Rule of Civil Procedure 72(a), a "district court [is] 'required to defer to the magistrate judge's ruling unless it was clearly erroneous or contrary to law.'" *Allen v. Sybase, Inc.*, 468 F.3d 642, 658 (10th Cir. 2006) (quoting *Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir. 1997)). "Under the clearly erroneous standard, 'the reviewing court must affirm unless it on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Allen*, 468 F.3d at 658 (quoting *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988)).

In claiming that the August 8, 2008 Order was based on "clearly erroneous" findings, Plaintiffs' Objection raises many of the same assertions and arguments that Magistrate Judge Joyner rejected in concluding that Defendants' narrowly tailored requests for extension were "reasonable and necessary." This response addresses each of Plaintiffs' arguments in turn to show that, contrary to Plaintiffs' assertion, Magistrate Judge Joyner's Order was based on documented facts demonstrating that "good cause" existed for the requested extensions.

I. "GOOD CAUSE" EXISTED FOR THE ORDERED EXTENSIONS

In the Court's August 8, 2008 Order, Magistrate Judge Joyner detailed a number of facts and circumstances on which the Court based its finding that "Defendants' requests for extension are … reasonable and necessary." Aug. 8, 2008 Opinion and Order, at 4 (Dkt #1756) ("Order"). A large number of these facts were created by Plaintiffs' own conduct, as they repeatedly violated Judge Joyner's orders compelling production of data until eventually he entered a sanctions order. By selectively criticizing Magistrate Judge Joyner's Opinion and glossing over

the facts demonstrating Defendants' need for the requested extensions, Plaintiffs' Objection claims that the grounds relied upon by the Court "do not rise to the level of 'good cause' needed to justify" the Order. Pls.' Obj. at 7-11. However, in reviewing the bases for Judge Joyner's ruling below, the Court's findings were properly based on record evidence demonstrating that the requested extensions were "reasonable and necessary" in light of the circumstances presented to the Court.

A. The Requested Extensions were Necessitated by Plaintiffs' Repeated and Continuing Failure to Produce All of the Relevant Data Required for the Defense Experts to Do Their Work

Magistrate Judge Joyner explicitly noted Plaintiffs' discovery failures as a basis for granting the requested extensions, stating that "[t]here are numerous instances of delayed and/or ongoing production of necessary data needed by Defendants to properly prepare their defense [some of which] are attributable to actions and/or inactions by Plaintiff." Order at 4. Plaintiffs' objection does not dispute the existence of these delays and omissions. Plaintiffs' repeated and continuing failure to produce necessary data for Defendants' experts to prepare their rebuttal analyses, in and of itself, constitutes sufficient ground for the extensions.

Additionally, Plaintiffs have admittedly produced—and indicated that they will continue to produce—large volumes of critical information *after* the deadline for production of *all* expert reports and underlying considered materials. As of the filing of this Response, Plaintiffs still have not produced the expert materials they were required to produce on May 15, 2008. As a result of the delayed or non-production of key data and expert reports, Defendants' experts have been delayed, or in some cases prevented, from engaging in their required rebuttal work.

1. Plaintiffs' Refusals and Failures to Produce Data

Plaintiffs have withheld—and continue to withhold—information that is essential for the defense experts to complete their rebuttal analyses. *See* Joint Mot. for Additional Time to

Produce Expert Reports, at 7-8 (June 12, 2008, Dkt #1722) ("Motion"); Defs.' Reply in Support of the Joint Mot. for Additional Time to Produce Expert Reports, at 1-3 (July 14, 2008, Dkt #1748) ("Defs.' Reply"). In recognizing that many of the delays experienced by defense experts were caused by Plaintiffs' own failure to abide by its discovery obligations, the Court found the requests for an extension to be both "reasonable and necessary" for defense experts to complete their rebuttal work. *See* Order at 4.

Under this Court's orders, Plaintiffs were required to produce expert reports and the underlying "considered" materials over a three-week period beginning May 15, 2008. *See* May 15, 2008 Order (Dkt #1706). Plaintiffs failed to meet this burden with respect to several key pieces of data and documentation underlying Plaintiffs' expert modeling files. After Plaintiffs' expert reports were produced, defense experts worked to assemble Plaintiffs' models from the many electronic files that Plaintiffs provided. But, Defendants' experts were stymied because it appeared that Plaintiffs had withheld essential components of their models. *See generally* First, Second and Third Bierman Decl. (Dkt #1722 Exh. 1; Dkt #1721 Exh. 1; Dkt #1742 Exh. A). After Plaintiffs' refused Defendants' repeated requests to produce these materials, Defendants filed a Motion to Compel. *See* Defs.' Mot. to Compel (June 12, 2008, Dkt #1721). In response, Plaintiffs affirmatively represented to the Court and Defendants that all of the requested files necessary to run the models had already been produced, and even filed a Motion to Strike Defendants' Motion to Compel. *See* Reply in Support of Mot. to Compel, at 2 n. 2 (July 14, 2008, Dkt #1747) ("Mot. to Compel Reply"). Yet, mere days prior to oral argument on the motions, Plaintiffs admitted that they had failed to produce certain key files and documents without which it was impossible for Defendants' experts to assemble Plaintiffs' models and begin the process of testing them. *See* Fourth Bierman Decl. at ¶¶ 8-9, 11-13, 16 (July 14, 2008,

Dkt #1748 Exh. A). Given this clear admission of fault, the Court granted Defendants' Motion to Compel. *See* Order at 2-3. Nevertheless, Plaintiffs' discovery failures caused Defendants' modeling to waste more than seven weeks trying to accomplish an impossible task. *See id.* at ¶ 16. Additionally, Plaintiffs' delay prejudiced several other defense experts, who cannot begin their work until the modeling analysis is complete. *See* Defs.' Reply at 3.

This initial failure to produce the required modeling files for almost two months was only the beginning of the delays caused by Plaintiffs' actions. Just two weeks ago, Plaintiffs notified Defendants that they intend to abandon their previous expert modeling work and replace it with a new 118-page expert report submitted more than three months after their expert deadline. *See* Aug. 26, 2008 Ltr. from D. Page to L. Southerland (attached as Exh. A); Errata Sheet for Report of Dr. Wells (attached as Exh. B). Defendants are currently in the process of submitting a motion asking the Court to address Plaintiffs' disregard of Judge Joyner's deadlines and the moving target that these repeated changes create for Defendants and their experts.

Plaintiffs also withheld several of the State's databases of environmental data, containing information about (a) septic systems in the Illinois River Watershed, (b) overflows and bypasses of the sewage treatment systems that drain into the Illinois River, (c) use of biosolids (sewage sludge) in the IRW; and (d) environmental complaints. *See* Motion at 6-7; Defs.' Reply at 4. These databases are relevant to the work of a number of Defendants' experts. After the filing of the Motion, Plaintiffs produced three of these databases, which Defendants' experts were only able to begin analyzing in July 2008. *See id.*; *see also id. at* Exh. B.[1] Plaintiffs' conduct was not

[1] Plaintiffs' Objection claims that Plaintiffs previously produced some of the information in these databases in hard-copy form, *see* Pls.' Obj. at 10, but Defendants have been unable to verify this representation as to several of the databases. Defendants have confirmed that, with regard to the septic system database, Plaintiffs have not produced anything that resembles the information described by Plaintiffs' 30(b)(6) witness. Regardless, Plaintiffs should have produced the

new to this litigation, as the Court was well aware; for example, Plaintiffs similarly withheld much of their ecological sampling data for up to 8 months, and as a result of their discovery misconduct, were sanctioned by this Court. *See* May 20, 2008 Op. and Order (Dkt #1710) (granting Motion to Compel and ordering sanctions).

2. Plaintiffs' Ongoing Production of Relevant Data

The Court also found that the requested extensions were necessitated by "numerous instances of . . . ongoing production of necessary data needed by Defendants to properly prepare their defense." Order at 4. In its own brief, Plaintiffs concede that "there is ongoing production of data from the State's sampling program . . . [because] the State's sampling and analysis program is still ongoing." Pls.' Obj. at 10.[2] More recently, Plaintiffs have submitted numerous supplemental expert reports (which Plaintiffs style as "errata sheets") improperly revising the data and calculations relied upon by Plaintiffs' experts to supplement, and oftentimes substantively modify, their experts' reports. *See, e.g.*, attached Exhs. A and B. These ongoing revisions and flow of sampling data present the defense experts with a moving target. As Dr. Timothy Sullivan explained in his declaration, the addition of new or modified data does not simply add an incremental burden to analyze the newly-disclosed facts. *See* Sullivan Decl. at ¶ 6 (June 12, 2008, Dkt #1722 Exh. 11). Rather, because all of the data in a complex environmental

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databases in the electronic form used by the State to make them reasonably usable to Defendants. These are just a few examples of the data Defendants await from Plaintiffs. Additional examples are listed and referenced in the briefs and exhibits submitted in support of the Motion. *See, e.g.*, Motion at 6-8, Exh. C; Defs.' Reply at 2-6.

[2] Exhibit D to Defendants' Reply catalogs several examples in this ongoing stream of productions evidencing that, even several years into this case, Plaintiffs' production of materials underlying their case is still not complete. *See* Defs.' Reply, at Exh. D. Exhibit C to this Response provides even further evidence of this continuing pattern of behavior. *See* Aug. 12, 2008 Ltr. from D. Gentry (attached as Exh. C). In fact, Plaintiffs recently sent substantial productions to Defendants on May 30, June 6, 10, 13, 18, 19, 25, 27, July 2, 10, and August 12, and have indicated that they intend to continue to generate expert data that will be considered and used to support their expert's findings.

case such as this are inter-related, the introduction of substantial new or modified data can cause an expert to reevaluate older data and change portions of his analysis and conclusions. *Id*. At a minimum, the defense experts must constantly revisit the work they have previously completed. If Plaintiffs are allowed to continue sending new data to Defendants' experts, the defense experts' work will never be done. Clearly this was not the Court's intention when it established a deadline for production of Plaintiffs' expert reports. At some point a party's allegations must be fixed so as to allow those allegations to be tested in a meaningful and orderly manner. *See Val-Land Farms v. Third National Bank*, 937 F.2d 1110, 1113 (6th Cir. 1991) ("[Parties] are not free to present a moving target, thereby making the courts (both us and the district court) as well as their opponent guess at the nature of the claim presented to the court."). Only after Plaintiffs stop the ongoing flow of new data and calculations relied upon by their experts, can defense experts proceed expeditiously in the preparation of their rebuttal reports.

B. The Previous Schedule was Infeasible Given the Tasks to be Completed Prior to the Filing of Defendants' Expert Reports

In granting the requested extensions, the Court also noted factors evidencing that the previous schedule did not permit sufficient time for Defendants to respond to Plaintiffs' expert reports given the voluminous size and number of expert reports, as well as the depositions of experts (retained and non-retained) and 30(b)(6) witnesses that needed to be taken during the same period.

In the Objection, Plaintiffs claim that neither the size nor the volume of Plaintiffs' expert reports should have been material to Magistrate Judge Joyner's analysis because, in essence, defense experts should have anticipated the theories of Plaintiffs' experts and developed responses before the reports were ever produced. *See* Pls. Obj. at 8-9 ("[Defendants] fully expected [to receive] voluminous reports" in a number that was "by no means unforeseeable or

surprising" and "Defendants had known since November 15, 2007, that they would have three months in which to prepare any disclosures they wished to make"); Pls.' Resp. in Opp., at 8-10 (June 30, 2008, Dkt #1736). These arguments ignore the history of this case, as well as the obvious relevance of the facts relied upon by Magistrate Judge Joyner. Although it has been clear from the first that Plaintiffs' claims would be driven primarily by experts, Defendants have not been able to anticipate the specifics of Plaintiffs' expert theories (or data sampling methods or locations) in light of the rules of expert confidentiality, which Plaintiffs have invoked liberally. In fact, Defendants had repeatedly sought to discover the details of Plaintiffs' expert case so they could do precisely the work Plaintiffs now claim should have been done earlier. But Plaintiffs repeatedly rejected Defendants' attempt to discover their scientific theories, emphasizing that they had a right to keep their expert case confidential until the deadline for expert reports.[3] Moreover, the mass of data that Plaintiffs have produced in this case makes Defendants' expert work slower, not faster, particularly when (as this Court has recognized) Plaintiffs have withheld a large amount of the data defense experts need to complete their work. In sum, Defendants' experts have worked diligently while this case has been pending, but Plaintiffs have exercised their right to keep the details of their complex scientific theories

[3] For example, in May 2006, Defendants issued discovery asking Plaintiffs to identify any experts who would testify at *any hearing* to be held in this case and the basis of their opinions. *See* Defs.' Mot. to Strike or Extend Resp. Deadline, at Exhs. C and D (Nov. 19, 2007, Dkt #1380). Plaintiffs refused to disclose the identity of any experts, their opinions, or the basis for these opinions until more than a year later, when Plaintiffs had to disclose some expert opinions in support of their motion for a PI.

Plaintiffs assertion that "nine of the State's retained experts authoring reports were previously disclosed in connection with the State's November 2007 Motion for Preliminary Injunction" is misleading. In connection with the PI motion, Plaintiffs disclosed only those experts and theories relating to the PI, and specifically barred Defendants from inquiring into scientific matters that extended beyond those issues. For example, on November 16, 2007, Defendants asked Plaintiffs to provide Rule 26(a)(2) expert disclosures for their PI experts. *See* Defs.' Mot. to Strike or Extend Resp. Deadline, at Exh. A (Nov. 19, 2007, Dkt #1380). On November 29, Plaintiffs' advised that they would provide no such information.

confidential until the deadline for their expert disclosures. As Defendants have repeatedly cautioned Plaintiffs, this procedure only slows Defendants' ability to respond to Plaintiffs' expert reports. *See* Resp. to Pls.' Mot. for Extension of Time, at 1 (Mar. 25, 2008, Dkt #1652).

Plaintiffs similarly argue that the Court's reference to the number of depositions to be taken before the deadline for disclosure of Defendants' expert reports is irrelevant. Once again, Plaintiffs are mistaken. Magistrate Judge Joyner recognized that the extensions were "reasonable and necessary," in part, to allow the depositions in question to be completed. Order at 4; July 17, 2008 Hearing Tr. at 50-55, 73-74. It is well within the Court's discretion to find that justice would be better served by such a schedule that would allow for a more complete analysis of the complicated expert analyses and theories in question. *See* Defs.' Reply at 7.

II. THE COURT'S ORDER IS CONSISTENT WITH A PRINCIPLE OF BALANCE BETWEEN THE AMOUNT OF TIME GRANTED TO EACH SIDE'S EXPERTS

One of Plaintiffs' principal arguments is that there should be balance between the amount of time granted to each side's experts to work with the data and scientific theories in this case. *See*, *e.g.*, Pls.' Obj. at 2-7, 11-13; Pls.' Resp. in Opp., at 1, 4 (June 30, 2008, Dkt #1736) ("Pls.' Opp."). Defendants agree with this general principle, but as noted in Defendants' Reply in Support of the Motion, a true balance between the time granted to each side's experts would result in far longer extensions than Defendants requested. Defendants requested that defense experts be provided time that represents a mere fraction of the substantial time that Plaintiffs' experts enjoyed to prepare their analyses. Such a request cannot be seen as inconsistent with this Court's prior rulings. On the contrary, Plaintiffs have repeatedly requested, and been granted, similar requests for extensions of time.

Plaintiffs' experts have worked on this case for more than three years, while exercising their right to keep their theories (and even their names) confidential until the Court's deadlines

forced their disclosure. During this period, Plaintiffs obtained more than six additional months for the preparation of their experts' reports through multiple motions for extensions.[4] Before the Court granted Defendants' narrowly-tailored requests for extension, the schedule provided defense experts with only three months to evaluate and respond to the voluminous reports and data generated by Plaintiffs' experts over this timeframe. Further, despite Plaintiffs' repeated assertion that the previous extensions granted to Plaintiffs were "mutual," in reality these extensions in no way benefited defense experts who were unable to begin the vast majority of their rebuttal analyses until *after* Plaintiffs' production of their experts' reports and underlying data. *See supra* Part I.B. at 7-8. In light of this disparity in time allocation, it cannot be said that the grant of Defendants' first request for such an extension is somehow inconsistent with prior rulings in this case.[5]

Plaintiffs complain that the Court cannot grant the requested extension because Magistrate Judge Joyner only granted a 45-day extension in March 2008, rather than the full four months Plaintiffs requested. However, upon closer analysis, this comparison rings hollow given the wildly different circumstances surrounding the requests. First, at the time of Plaintiffs' request, Plaintiffs had already worked for nearly three years to assemble the theories and data

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[4] *See, e.g.*, Pls.' Resp. to Mot. for Modification of Scheduling Order (Oct. 15, 2007, Dkt #1322) (seeking an 8-month across-the-board extension); Nov. 15, 2007 Scheduling Order (Dkt #1376) (granting Plaintiffs a 4-month across-the-board extension); Pls.' Mot. for Extension of Time (Mar. 7, 2008, Dkt #1618) (seeking an additional 4-month across-the-board extension, for which the Court granted six weeks); Pls.' Emergency Mot. for a Brief Extension (May 13, 2008, Dkt #1702) (seeking another week for some experts, and two weeks for others); May 15, 2008 Order (Dkt # 1706) (granting request in Dkt #1702).

[5] Furthermore, contrary to Plaintiffs' assertion, Magistrate Judge Joyner did not grant Defendants' requests in full. *Compare* Motion at 1-2; *with* Order at 3-4, 5-6. Rather, for a majority of the requests the Court granted shorter extensions than initially requested by Defendants, based upon counsel's offer at oral argument to narrow the requests for certain experts based upon progress made to date. *See* Order at 3-4; July 17, 2008 Hearing Tr. at 57-63, 83-84.

underlying their affirmative expert case and the Court had already granted a four-month extension at Plaintiffs' request. *See* Nov. 15, 2007 Scheduling Order (Dkt #1376). Finally, although Plaintiffs' complain that the Court improperly limited their requested extension, Magistrate Judge Joyner subsequently granted, in full, Plaintiffs' request for an additional extension of time mere weeks before the deadline for filing their expert reports. *See* May 15, 2008 Order (Dkt # 1706).

III. THE EXTENSIONS DO NOT UNFAIRLY PREJUDICE PLAINTIFFS

Plaintiffs' last objection to the Court's August 8, 2008 Order asserts that Magistrate Judge Joyner failed to weigh the purported prejudice to Plaintiffs. As an initial matter, Plaintiffs are incorrect in claiming that the Court failed to consider any prejudice that would result from the Order granting the extensions. Plaintiffs repeatedly raised this argument to the Court, and simply put, the Magistrate Judge Joyner did not find the argument compelling. *See*, *e.g.*, Pls.' Opp. at 23-25; July 17, 2008 Hearing Tr. at 86-87, 94-95.

Furthermore, neither here nor before the Magistrate Judge have Plaintiffs ever provided any credible evidence that they will be prejudiced by allowing defense experts a mere fraction of the amount of time enjoyed by Plaintiffs' experts. Even with the extensions, Plaintiffs will receive most of Defendants' expert reports *eleven months* before the September 2009 trial date and the last defense expert report at least three months before trial.

Finally, any prejudice Plaintiffs may claim to suffer is directly attributable to Plaintiffs' own dilatory conduct in failing to properly disclose the sampling, modeling and other data underlying their expert reports. *See supra* Part I.A. at 3-7. Plaintiffs' complaints of prejudice are therefore immaterial, as their own discovery misconduct necessitated the requested extensions.

CONCLUSION

The Magistrate Judge's findings that the requests for extension were "reasonable and necessary" are firmly supported by the record and not clearly erroneous. Defendants therefore request that the Court deny Plaintiffs' Objection to Magistrate Judge Joyner's August 8, 2008 Opinion and Order.

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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__/s/ *Jay T. Jorgensen*_____